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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:  
Dudek

Serial No.: 09/843,381

Filed: April 25, 2001

For: Process and System for  
the Customization of  
Consumer Products

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6/2/06 D. Brit Nelson  
Date D. Brit Nelson

Dear Sir:

**REPLY BRIEF TO EXAMINER'S ANSWER**

Appellants hereby timely submit this Reply Brief, in triplicate, in response to the Examiner's Answer having a mailing date of April 4, 2006. The Reply Brief responds to the Examiner's characterization of the primary cited reference to U.S. Pat. No. 6,062,277 ("Seo"). It is believed that no fees are due; however, if there are any charges or credits, the Commissioner is authorized to charge or credit Deposit Acct. No. 12-1322/013129-00550.

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## **I. APPLICANT'S REPLY TO SECTION (10) OF THE ANSWER**

As background and interpretation of defined terms in the claims, independent claim 1 requires, and independent claim 6 as an apparatus claim has correspondingly similar language, the following limitations:

(a) preparing said customisable consumer products according to available selections made by a consumer of one or more components of said consumer products having product characteristics chosen by the consumer,

(b) optionally reconstituting said components with one or more other components, . . .

The specification defines "consumer products" as "products which are produced by processes that cannot be reliably and/or easily replicated by an unskilled user in normal use locations." (Specification, para. [0022], p.6, ll. 1-4.) "For example, the manufacture of cleaning products, as performed by cleaning products manufacturers cannot be easily replicated by the consumer in the home." (*Id.*, p.6, ll. 4-7.) The specification differentiates between such "consumer products" and the production of easily replicated beverages, such as tea and coffee. (*Id.*, para. [0017], p.4, ll. 11-14.) The consumer can select from a plurality of selections particular components of such defined consumer products to produce a customized consumer product.

Once the desired concentrate sources have been dosed [based on selections] to achieve the desired chemical properties and/or physical properties of the consumer product, the customised concentrated consumer product may be dispensed, or, in a preferred embodiment, one or more diluents may be added to reconstitute the consumer product to achieve its desired concentration.

(*Id.*, para. [0035], p.9, l.19 - p.10, l. 2.) Thus, not only can the "available selections made by the consumer" as recited in the claims include the type of component selected, but the selections

can also be the dosage of the component to achieve “product characteristics chosen by the consumer,” as also recited in the claims.

The claims also require “optionally reconstituting said components with one or more other components” and corresponding language for apparatus claim 6. The specification states that reconstituting is the step of adding a diluent to the selected components. (*Id.*, para. [0035], p.9, l.19 - p.10, l. 2, quoted above.)

Thus, reconstitution with diluent offers the consumer the choice of purchasing the product in more traditional ready-to-use forms or in a more concentrated form. As well as ease of transport, such an option allows the consumer to customise strength of the consumer product according to requirements. In the case of cleaning products this could depend upon the demands of the articles to be cleaned.

(*Id.*, para. [0036], p.10, l. 3-10.)

Thus, the present invention includes a unique and nonobvious opportunity for customers to customize a defined “consumer product.” As a overall summary of these aspects, paragraphs [0063] and [0064] on page 15 state for an exemplary application of the invention:

[0063] Said consumer then selects in step 4 the amount of cleaning product required from the available options that are shown on the interface of the vending system, and whether the cleaning product is to be reconstituted or dispensed as a concentrate.

[0064] Said consumer then checks and confirms in step 5 that the cleaning product specification shown on the interface of the vending system is correct, prior to dispensing in step 6 said cleaning product from the vending system.

Having stated the background, and interpretation and explanation of terms in the specification, attention is now turned to the rejections that are the basis of this appeal.

**A. U.S. Pat. No. 6,062,277 to *Seo* does not teach, show, or suggest the present invention recited in the claims.**

*1. The crucial issue for the appeal is determining exactly what Seo teaches, shows, or suggests.*

*Seo* has been used to reject the claims by combining Applicant's other patents for obvious type double patenting, to reject the claims under section 102(e), and to reject the claims under section 103(a) in combination with other references. If *Seo* teaches, shows, or suggest the interpretation asserted by the Examiner, namely, that *Seo* teaches "preparing said customisable consumer products according to available selections made by a consumer of one or more components of said consumer products having product characteristics chosen by the consumer" and "optionally reconstituting" as claimed in claim 1 with similar language in claim 6, then the Board can reject at least the independent claims. If *Seo* does not fairly teach, show, or suggest such interpretation, then the Board should allow the pending claims. Either stance appears to be a focused and succinct inquiry.

Importantly, *Seo* does not teach, show, or suggest any available selections made by a consumer of one or more components of a consumer product to be able to make a customized consumer product in non-standard, non-preprogrammed formulations. Further, *Seo* does not teach, show, or suggest any selections made on dosage. Still further, *Seo* does not teach, show, or suggest any selections made to "optionally" reconstitute. Finally, *Seo* does not even apply to the defined "consumer product", but rather applies to beverages for cups such as coffee. In fact, *Seo* teaches away from such "consumer products," as the present specification specifically differentiates from such beverages as coffee and tea.

*Seo* teaches choosing a beverage end product, mainly coffee, and preparing that beverage end product from standardized, preprogrammed formulations. Only upon using prohibited

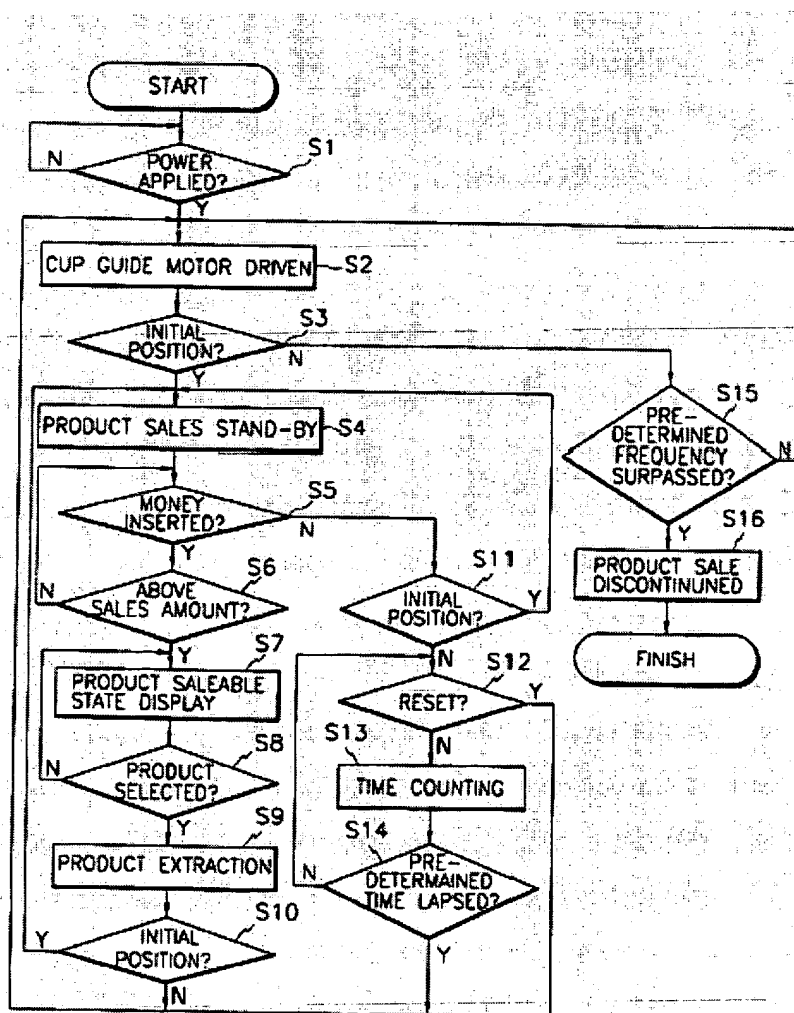
hindsight and arduous logic can the position be supported that *Seo* teaches otherwise. *Seo* is limited to what it fairly teaches. “Disclosures in a prior art reference must be evaluated for what they “fairly teach to one of ordinary skill in the art.” *W.L. Gore & Associates Inc. v. International Medical Prosthetics Research Associates Inc.*, 16 USPQ2d 1241, 1259 (D. AZ. 1990) (citing *Application of Boe*, 355 F.2d 961, 148 USPQ 507, 510 (C.C.P.A. 1966)).

Hindsight using the disclosure of the present invention to interpret a prior cited reference and to reject the claims in the present invention is prohibited. “The references must be viewed without the benefit of impermissible hindsight vision afforded by the claimed invention.” Manual of Patent Examining Procedure (“MPEP”) § 2141 (citing *Hodosh v. Block Drug Co., Inc.*, 786 F.2d 1136, 1143 n.5, 229 USPQ 182, 187 n.5 (Fed. Cir. 1986)). As the MPEP states, it “is difficult but necessary that the decision maker forget what he or she has been taught . . . about the claimed invention and cast the mind back to the time the invention was made (often as here many years), to occupy the mind of one skilled in the art who is presented only with the references, and who is normally guided by the then-accepted wisdom in the art.” (MPEP § 2141.01, citing *W.L. Gore & Associates, Inc., v. Garlock, Inc.*, 721 F.2d 1540, 220 USPQ 303, 313 (Fed. Cir. 1983), *cert. denied*, 469 U.S. 851 (1984)).

*Seo* fairly teaches selecting standardized, preformulated beverage end products for filling a cup. A dispensing machine retrieves, without further necessary input, the items necessary to fulfill the customer choice of a preprogrammed end product. The end product is dispensed and the customer can leave with the preprogrammed end product without variation from other customers who also select the preprogrammed end product. In stark contrast, the claims recite customizable consumer products according to available selections made by a consumer who can directly select one or more components of the consumer products. For example, the consumer

can directly choose such options as fragrance, color, antibacterial agents, bleaching agents, agents to prevent the creasing of fabrics, water softeners, and limescale removers to create a customized consumer product. (Specification, para [0062], p.15, ll. 11-13.) This ability to make such selections allows creating non-standard, non-preprogrammed consumer products, the opposite teaching of *Seo*.

Figure 8 in *Seo* supports this product-only interpretation of *Seo*. It clearly shows that the product, not the components, is being selected in Step S8 after end products to be sold are displayed in Step S7, as seen below.



Step S8 shows that a product is selected, not the components or amounts of components. The product is then created by the machine according to preprogrammed sequences in Step S9, as described in column 5, lines 51-56:

Successively, at step S8, the controller 420 discriminates whether a desired product is selected by the user via the product selecting unit 410, and if the desired product is not selected, the controller 420 repeats the step S7 and if the desired product is selected, the controller 420 performs step S9 [mixing the preprogrammed product in Fig. 9].

Column 3, lines 58-62 further supports the Applicant's interpretation of *Seo* (emphasis added):

The product selecting unit 410 disposed with a plurality of buttons corresponding to respective products in the automatic vending machine serves to input a product selection signal to the controller 420 when the buttons are manipulated.

The consumer selects among the buttons for the various end products offered. The machine then mixes raw materials based on a preprogrammed formulation of the end product selected by the consumer.

In contrast, the present invention allows available selections to a consumer of one or more components, such as type of component and dosage as described in the specification, to create customized consumer products with individual characteristics desired from consumer to consumer.

Importantly, the claims in the present application also recite optionally reconstituting. Even using the Examiner's examples of black coffee or coffee with cream, *Seo* does not teach dispensing just cream and allowing the consumer to *optionally* choose to dilute (reconstitute) the cream with coffee. It would be malfunction of the *Seo* vending process, not a selection.



In conclusion, *Seo* discloses a user selecting a preprogrammed end product. The machine disclosed in *Seo* then does the rest without variation. One can search in vain in *Seo* for any mention or even a hint of creating a customized consumer product from available selections made by a consumer of one or more components of consumer products.

2. *Most of the discussions in the Answer appear to misapply the Applicant's arguments.*

Pages 4-13 of the Answer attempt to rebut Applicant's position by implying that Applicant does not recognize that the machine uses raw materials to make a selected end product. The fact that the machine mixes the product has not been in dispute in Applicant's arguments now or earlier. Indeed, the fact that the machine uses preprogrammed steps based on the end product selected by the consumer supports the Applicant's position and not the Examiner's position. *Seo* is clear. *Seo* offers a selection of preestablished, preprogrammed end products—and not even “consumer products” as defined in the specification—it does not teach allowing available selections to consumers of one or more components of a consumer product having product characteristics chosen by the consumer.

3. *The Answer actually solidifies Applicant's position.*

On page 13, first full paragraph, the Answer apparently for the first time recognizes the argument of Applicant, but then states such argument is still irrelevant in that the consumer selects among products to produce various products. This argument actually solidifies Applicant's position. On the argument's face, it recognizes that the customer does not actually select the components, only the end product. In contrast, the present claims recite that the customized consumer products are prepared from according to available selections made by a

consumer of one or more components of said consumer products having product characteristics chosen by the consumer.

In conclusion, if *Seo* is fairly interpreted, it teaches selecting a preprogrammed end product. The claims contrasts sharply by allowing available selections made by a consumer of one or more components of said consumer products, or optionally reconstituting the selected components with one or more other components. *Seo* does not teach, show, or suggest such a distinction and limitation. Therefore, the rejections based on *Seo*, alone or in combination, should not be sustained. Because all rejections hinge on *Seo*, then the claims are patentable if the rejections based on *Seo* are not sustained.

**B. The judicially created doctrine of obviousness-type double patenting is inapplicable to claims 1-18, and claims 1-18 are patentable.**

Claims 1-18 are currently rejected under the judicially created doctrine of obviousness-type double patenting over claim 1 of U.S. Pat. No. 6,598,631 and claim 1 of 6,615,880 in view of *Seo*. The Examiner admits that the teaching of *Seo*, as interpreted by the Examiner, is necessary to sustain the obviousness-type double patenting of claims 1-18 in the present invention. However, U.S. Pat. No. 6,598,631 and 6,615,880 does not teach, show, or suggest “preparing said customisable consumer products according to available selections made by a consumer of one or more components of said consumer products having product characteristics chosen by the consumer,” as recited in claim 1 and corresponding language in claim 6.

The Examiner does not dispute this lack of teaching in the ‘631 and ‘880 patents. Instead, the Examiner directs the Board to *Seo* and argues that *Seo* teaches taking “plural raw materials . . . and through a selection process of the user, customizes a mixture according to the person’s desired tastes.” (Answer, p. 6.) The Examiner then asserts that given such

interpretation, the present invention would be an obviousness variant of the combination of references.

The difficulty with this logic is that *Seo* does not teach, show, or suggest any customized consumer products based on available selections of one or more components, as explained above. There is no motivation to combine *Seo* with either of the two referenced patents to teach “preparing said customisable consumer products according to available selections made by a consumer of one or more components of said consumer products having product characteristics chosen by the consumer” or “optionally reconstituting.” Thus, each cited U.S. Patent, alone or in combination with *Seo*, do not teach, show, or suggest the claimed subject matter. The claims are patentable.

**C. The claims are patentable as not being anticipated by *Seo* under Section 102(e).**

Claims 1, 2, 3, 6, 8, 14, and 16 are rejected as being anticipated by *Seo* under Section 102(e). For *Seo* to anticipate the listed claims, *Seo* must teach each and every limitation in the claims, including “preparing said customizable consumer products according to available selections made by a consumer of one or more components of said consumer products having product characteristics chosen by the consumer,” and “optionally reconstituting said components with one or more other components” as recited in claim 1 with similar language in claim 6. *Seo* does not teach either aspect of independent claims 1 or 6, or their associated dependent claims.

As explained above, *Seo* fairly teaches selecting from standardized, preprogrammed formulations to produce beverage end products for filling a cup. *Seo* does not teach having a customizable consumer product prepared according to available selections made by a consumer

of one or more components of the consumer products having product characteristics chosen by the consumer, or optionally reconstituting. The claims are patentable.

**D. The claims are patentable over *Seo* in view of *Partyka* under Section 103(a).**

Claims 1-10 are rejected as being obvious over *Seo* in view of *Partyka*. *Seo* has been distinguished and does not teach the current invention. *Partyka* provides a better *monitoring* system, not *controlling* the *operations* of the unit as asserted in the Answer and in the prosecution history. *Partyka* teaches actuating a monitor when a coin is inserted or charge is indicated. The combination of *Seo* with *Partyka* yields a vending machine of preprogrammed end products with a more accurate monitoring to produce a more accurate service/repair schedule. The combination of *Seo* and *Partyka* does not make up the deficiency of *Seo* for the claims. The combination does not teach, show, or suggest the invention. The claims are patentable.

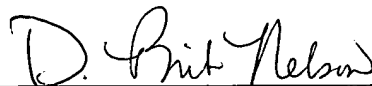
**E. The claims are patentable over *Seo* in view of *Whigham* under Section 103(a).**

Claims 6-8 and 11-18 are rejected as being obvious over *Seo* in view of *Whigham*. *Seo* has been distinguished and does not teach the current invention. Aside from other differences, *Whigham* teaches a single interface. *Whigham* does not teach “a plurality of interfaces” as required the relevant claims. More importantly, *Whigham* does not disclose having available selections of one or more components of consumer products, as required by the claims. Thus, the combination of *Seo* and *Whigham* still does not teach, show, or suggest the invention. The claims are patentable.

## II CONCLUSION

In summary, *Seo* has been the primary reference in the prosecution history and continues to the present time. *Seo* appears to have been interpreted in a manner that is not consistent with a fair and plain reading of its disclosure—an interpretation that can be attributed to using hindsight and the benefit of the teaching of the present disclosure.

*Seo* does not teach, show, or suggest having a customizable consumer product prepared according to available selections made by a consumer of one or more components of the consumer products having product characteristics chosen by the consumer, or optionally reconstituting the components with one or more other components. Since *Seo* does not teach such, the several rejections relying on *Seo* must fall. The claims are patentable. A decision of the Board consistent with this showing is earnestly requested.



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